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8  
9 **UNITED STATES DISTRICT COURT**  
10 **DISTRICT OF NEVADA**

11 \* \* \*

12 TRINA OLSEN,

13 Plaintiff,

Case No.: 3:19-cv-00665-MMD-WGC

14 vs.

15 WASHOE COUNTY SCHOOL  
16 DISTRICT, a political subdivision of the  
17 State of Nevada; Washoe County School  
18 District Superintendent TRACI DAVIS;  
19 and DOES 1 through 10, inclusive,

**RESPONSE IN OPPOSITION TO  
MOTION FOR ATTORNEY'S FEES**

20 Defendants.  
21 \_\_\_\_\_/

22 COMES NOW, TRINA OLSEN, ("Olsen" or "Plaintiff"), by and through the  
23 undersigned counsel, and files the following Response in Opposition to the Motion  
24 for Attorney's Fees (Doc. #57) filed by Defendant WASHOE COUNTY SCHOOL  
25 DISTRICT, a political subdivision of the State of Nevada ("WCSD") on March 2,  
26 2020.

27 **MEMORANDUM OF POINTS AND AUTHORITIES**

28 WCSD makes the following basic arguments in its Motion: (1) Attorney's fees  
are available to WCSD based on 42 U.S.C. 1988 because the Plaintiff's claim was  
"frivolous, unreasonable, or without foundation;" and (2) WCSD is entitled to  
attorney's fees pursuant to the provisions of FRCP 54(d)(2) and the factors  
outlined in the *Bruznell* decision. The Plaintiff will address these arguments in turn  
below.

1 The Court is well aware of the factual underpinnings of Olsen’s claim as  
 2 described in her Motion for Summary Judgment (Doc. #37), her Reply thereto  
 3 (Doc. #50), and Olsen’s Response in Opposition to WCSD’s Motion for Summary  
 4 Judgment (Doc. #60). This Motion is made and based upon all of the pleadings  
 5 and records on file for this proceeding together with every exhibit that is mentioned  
 6 herein or attached hereto (each of which is incorporated by this reference as  
 7 though it were set forth hereat in haec verba), if any there be.

8 ***The basis for dismissal of the Plaintiff’s claims by the Court does not***  
 9 ***rise to the level that would justify and award of Attorney’s Fees under 42***  
 10 ***U.S.C 1988 - There are no “exceptional circumstances” here***

11 The 9<sup>th</sup> Circuit has repeatedly held that, under 42 U.S.C. 1988, “fees in civil  
 12 rights cases should only be awarded to a defendant in exceptional circumstances.”  
 13 *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990); see also *Manufactured Home*  
 14 *Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1036 (9th Cir. 2005); *Mitchell v.*  
 15 *L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 202 (9th Cir. 1989). “The mere fact that a  
 16 defendant prevails does not automatically support an award of fees. A prevailing  
 17 civil rights defendant should be awarded attorney’s fees not routinely, not simply  
 18 because [the defendant] succeeds, but only where the action brought is found to  
 19 be unreasonable, frivolous, meritless, or vexatious.” *Patton v. Cty. of Kings*, 857  
 20 F.2d 1379, 1381 (9th Cir. 1988) (citations and internal quotation marks omitted);  
 21 see also *Kentucky v. Graham*, 473 U.S. 159, 165 n.9 (1985); *Hensley v. Eckerhart*,  
 22 461 U.S. 424, 429 n.2 (1983); *Fabbrini v. City of Dunsmuir*, 631 F.3d 1299, 1302  
 23 (9th Cir. 2011); *Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963, 971–72 (9th  
 24 Cir. 2011); *Edgerly v. City & Cty. of San Francisco*, 599 F.3d 946, 962 (9th Cir.  
 25 2010); *Gibson v. Office of Att’y Gen., Cal.*, 561 F.3d 920, 929 (9th Cir. 2009);  
 26 *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007); *Tutor-Saliba*  
 27 *Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006); *Manufactured Home*  
 28 *Cmtys. Inc.*, 420 F.3d at 1036; and *Thomas v. City of Tacoma*, 410 F.3d 644, 647–

1 48 (9th Cir. 2005). A case is considered “frivolous” in the Ninth Circuit when the  
2 result is obvious, or the arguments are wholly without merit. *Manufactured Home*  
3 *Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005).

4 WCSD, in support of its Motion, cites cases from other Circuits, which conflict  
5 with the high standard established by the 9<sup>th</sup> Circuit above. For example, on page 6  
6 line 21 of WCSD’s Motion, WCSD quotes *Head v. Medford*, 62 F.3d 351, 356 (11<sup>th</sup>  
7 Cir. 1995) in support of the proposition that the 9<sup>th</sup> Circuit found that a civil rights  
8 claim based upon a claim to a property interest that did not exist was frivolous.  
9 However, *Head* is a 11<sup>th</sup> Circuit case, is not controlling here, and in this case this  
10 Court agreed with Olsen and found that Olsen did have a property interest in her  
11 position at WCSD, so the analysis therein is not applicable here.

12 In the forty-three-year-old Supreme Court case repeatedly cited by WCSD in  
13 its Motion, *Christiansburg Garment Co. v. Equal Emp’t Opportunity Comm’n*, 434  
14 U.S. 412, 415, 98 S. Ct. 694, 697 (1978), a Title VII plaintiff’s claim was dismissed  
15 on summary judgment where the Court found that the Plaintiffs claim had not been  
16 pending, and as such she was attempting to pursue a case despite clearly being  
17 excluded from doing so by statute. Despite this, the District Court denied the motion  
18 for attorney’s fees and the Supreme Court affirmed the judgment of the Court of  
19 Appeals upholding the decision of the District Court, finding that 42 U.S.C. 1988  
20 generally does not require plaintiffs in civil rights cases to pay attorney’s fees. *Id.*

21 Olsen’s case presented a novel question to the Court, which was, when a  
22 Nevada public school employee is fired despite a statute requiring that she be  
23 provided with a hearing before such a firing take place, does her being terminated  
24 before the hearing violate her Due Process rights under the 14<sup>th</sup> Amendment to the  
25 US Constitution and the Due Process Clause of the Nevada Constitution. Olsen  
26 also presented numerous facts to substantiate her Due Process claims, i.e. that  
27 Olsen was terminated on grounds that had been dismissed in previous hearings,  
28 and brand new grounds for which she was never provided a hearing. (See Doc. #

60, generally). In other words, Olsen was not provided with notice, a hearing, or an opportunity to be heard on the renewed, previously dismissed, or new allegations of misconduct against her before she was terminated. The Plaintiff relied on well-established precedent in making this case that due process required that she be provided with a pre-termination hearing on all of the grounds being used against her before she was terminated. *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987). Other courts have held that even a 16-day suspension without pay is a deprivation of employment that implicates the protections of due process. *Eldridge-Murphy v. Clark Cty. Sch. Dist.*, No. 2:13-cv-02175-JCM-GWF, 2015 U.S. Dist. LEXIS 5621, at \*9 (D. Nev. Jan. 14, 2015) citing *Assoc. for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011).

Olsen's claim under the Nevada Constitution is similarly well-grounded in precedent, as public employees who may be terminated only for just cause have a constitutionally protected property interest and are entitled to due process before being deprived of that interest. *Pressler v. City of Reno*, 118 Nev. 506, 511, 50 P.3d 1096, 1098 (2002). That this Court disagreed on these points and ruled against Olsen does not render her claim frivolous or groundless.

WCSD admitted in its Motion for Summary Judgment that WCSD violated the provisions of NRS 391.824, and in this Court's Order granting summary judgment to WCSD this Court agreed, finding that the Olsen was correct that WCSD fired her in violation of NRS 391.824. (Doc. #66 at 23). However, the Court was not persuaded that violation of NRS 391.824 constituted a violation of Olsen's due process rights under the US nor Nevada Constitution. To the undersigned counsel's knowledge, this is the first time any court in Nevada has interpreted a violation of the statutory procedural right in NRS 391.824 under Nevada law in this manner.

At the end of the day, this Court found that the fact that Olsen had received back pay weighed in favor of a finding that she received due process, citing *Russo v. Clark Cty. Sch. Dist.*, Case No. 2:17-cv-805-JCM-VCF, 2019 WL 1359263, at \*5

1 (D. Nev. Mar. 26, 2019), appeal dismissed, Case No. 19-15744, 2019 WL 3059950  
2 (9th Cir. July 5, 2019). The fact that the Court was required to weigh whether  
3 Olsen's claim should be permitted to proceed means that Olsen's claim was based  
4 on non-frivolous grounds. This case comes nowhere near the "exceptional  
5 circumstances" required in the 9<sup>th</sup> Circuit for a defendant to prevail on a motion for  
6 attorney's fees under 42 U.S.C. 1988.

7 Further, nowhere in this Court's Order granting summary judgment to WCSD  
8 does the Court intimate that Olsen's claim was "unreasonable, frivolous, meritless,  
9 or vexatious." To the contrary, the Court carefully weighed the facts and  
10 determined, as a matter of law, that Olsen's deprivation, i.e. being terminated and  
11 expending attorney's fees and costs to fight her unlawful termination, did not rise to  
12 the level of depravation required to prevail on her procedural due process claims.  
13 (Doc. #66 at 12). In *Patton v. Cty. of Kings*, 857 F.2d at 1380, the court granted  
14 defendants' motion for summary judgment where a plaintiff failed to allege  
15 deprivation of a liberty or property interest, found that plaintiff's action was  
16 groundless, and awarded defendants attorney's fees. In *Edgerly v. City & Cty. of*  
17 *S.F.*, 599 F.3d at 953, the 9<sup>th</sup> Circuit upheld the granting of a defendant's motion for  
18 sanctions against a plaintiff and his attorney under 42 U.S.C 1988, upholding a  
19 finding that they filed two frivolous motions for reconsideration of the court's  
20 summary judgment ruling. There are no analogous finding here that would justify a  
21 similar finding in Olsen's case, and the Court should not make any here. Further,  
22 the Court found for Olsen on at least two hotly contested point in the motions for  
23 summary judgment, that Olsen had a protected property interest in her job at  
24 WCSD (Doc. #66 at 11:11), and that, "Plaintiff persuasively responds to  
25 Defendants' evidentiary objection that the substance of the evidence presented in  
26 her exhibits would be admissible at trial." *Id.* at 9:26.

27 For her tortious discharge claim, Olsen also had good faith grounds to  
28 support her claim, and her claim was far from frivolous or groundless. In

1 addressing the incident involving the marijuana at issue, the Arbitrator's decision  
2 made plain that WCSD retaliated against Olsen and fired her for reporting that she  
3 had been made aware that WCSD employees were allegedly engaged in  
4 inappropriate activities involving drugs at school: Doc. #37-33 at 32: "Olsen  
5 reported a hearsay statement and expected a fair investigation, and instead was  
6 terminated. This discipline is retaliatory and overly punitive." Olsen did not report  
7 the alleged misconduct at issue to her "supervisor" Ford in a private or proprietary  
8 manner, but rather to Gonzalez, a public official and the Area Superintendent for  
9 WCSD. While this court found that Olsen failed to report the matter to someone  
10 outside of her organization, this is also a gray area subject to disputes under which  
11 reasonable minds can disagree. Doc. #66 at 18.

12 For example, because Olsen worked for WCSD, which is a political  
13 subdivision of the State of Nevada, she arguably could not have reported the issue  
14 to any person employed by the State of Nevada because as a technical matter all  
15 state employees are under the same "organization." This issue was also novel,  
16 because, as Olsen argued, the Nevada Supreme Court has not drawn clear lines in  
17 cases where a government agency or a government employee is at issue in a  
18 tortious discharge claim – only that reporting illegal activity to one's supervisor in a  
19 private company is not sufficient and that one must report illegal activity to the  
20 "appropriate authorities." *Wiltsie v. Baby Grand Corp.*, 774 P.2d at 433 (1989).  
21 While drawing this distinction in a private company is relatively easy, doing so for a  
22 public employee is more difficult given the entangled nature of the organization of  
23 the state. Olsen had a good faith and non-frivolous argument that she reported the  
24 marijuana issue to a person outside of her workplace (Hug High), and therefore she  
25 would be protected by Nevada's tortious discharge claim provisions. Again, the  
26 mere fact that WCSD prevailed on this claim at summary judgment does not  
27 automatically support an award of fees or mean that her claim was frivolous or  
28 unfounded, as WCSD asserts.

**WCSD's Motion does not meet the requirements of LR 54-14 or the Brunzell factors**

WCSD bases its analysis of whether attorney's fees sought are reasonable according to the standard adopted by the Nevada Supreme Court in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (Nev. 1969) (quoting *Schwartz v. Schwerin*, 336 P.2d 144, 146 (Ariz. 7 1959)): (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived. Under the lodestar approach sought here by WCSD, the Court takes the hours reasonably worked on the case and multiplies it by the customary rate for attorneys in the area. *Herbst v. Humana Health Ins.*, 105 Nev. 586, 781 P.2d 762 (1989), however, WCSD did not present any evidence in its motions sought were reasonable or are customary for attorneys in the area, which are usually presented in the form of declarations from other attorneys showing that the requested amount is reasonable customary. Further, the Affidavit of Mr. Vance filed along with the Motion (Doc. #71) does not contain the information required under *Brunzell* factor No.1, that is, qualities of the advocate: his ability, training, education, experience, professional standing and skill, which is usually presented in the form of a detailed resume and case history. Mr. Dotson's resume is attached to his Affidavit in Doc. #72, and in all fairness, demonstrates that Mr. Dotson is qualified for the rate claimed.

Further, according to Local Rule ("LR") 54-14(a)(3), a motion for attorney's fees "must include" the following elements: a brief summary of: (A) The results obtained and the amount involved; (B) The time and labor required; (C) The novelty and difficulty of the questions involved; (D) The skill requisite to perform



1 the legal service properly; (E) The preclusion of other employment by the attorney  
2 due to acceptance of the case; (F) The customary fee; (G) Whether the fee is fixed  
3 or contingent; (H) The time limitations imposed by the client or the circumstances;  
4 (I) The experience, reputation, and ability of the attorney(s); (J) The undesirability  
5 of the case, if any; (K) The nature and length of the professional relationship with  
6 the client; (L) Awards in similar cases; and (M) Any other information the court may  
7 request. LR 54-14 provides clear guideposts as to what the Court expects to see  
8 when evaluation a motion for attorney's fees, and WCSD's Motion disregarded this  
9 rule (it is not mentioned) and does not include many of the elements required to be  
10 addressed.

11 Specifically, WCSD never expressly addresses the following elements of LR  
12 54-14(a)(3): Element (C), the novelty and difficulty of the questions involved;  
13 Element (E), the preclusion of other employment by the attorney due to  
14 acceptance of the case; Element (F), the customary fee; Element (H), the time  
15 limitations imposed by the client or the circumstances; Element (J), the  
16 undesirability of the case; and, Element (L), awards in similar cases. According to  
17 LR 54.14(c), Failure to provide the information required by subsections (b) and (c)  
18 (presumably LR 54-14(a)(3) "B" and C") in a motion for attorney's fees may be  
19 deemed a consent to the denial of the motion. In addition to the arguments made  
20 above, because WCSD did not include the information required by LR 54.14(a)(3),  
21 the motion should be deemed denied.

22 WHEREFORE, Olsen requests that the Court deny WCSD's Motion for  
23 Attorney's Fees.

24 ///


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27 ///



**DATED** this Wednesday, March 3, 2021:

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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5, I certify that on the date shown below, I caused service to be completed of a true and correct copy of the foregoing pleading by:

\_\_\_\_\_ personally delivering;

\_\_\_\_\_ delivery via Reno/Carson Messenger Service;

\_\_\_\_\_ sending via Federal Express (or other overnight delivery service);


\_\_\_\_\_ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,

  X   delivery via electronic means (fax, eflex, NEF, etc.) to:

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